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Conduct and Belief in the Free Exercise Clause: Developments and Deviations in Lyng v. Northwest Indian Cemetery Protective Association

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CONDUCT AND BELIEF IN THE FREE EXERCISE CLAUSE: DEVELOPMENTS AND DEVIATIONS IN *LYNG V. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION*

INTRODUCTION

> I am convinced that no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause explicit in the First Amendment and imbedded in the Fourteenth.
>
> —Justice Potter Stewart[1]

The free exercise clause of the first amendment prohibits a legislature from enacting laws that interfere with an individual's religious practice and belief.[2] The Supreme Court's modern[3] free exercise decisions have echoed Justice Stewart's sentiment, applying the strictest scrutiny to laws that conflict with an individual's ability to practice sincerely held religious beliefs.[4] In its most recent decisions, however, the Court has reduced the level of scrutiny applied to free exercise challenges, adopting a more restrictive interpretation of the personal religious freedom secured by the first amendment.[5]

This Note first explores a normative theory of free exercise protection[6]—that religious freedom must encompass religious practices and conduct—and then traces the evolution of the Court's standard for protecting free exercise rights.[7] Early Court decisions adopted a strict construction of the free exercise clause, protecting freedom of

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1 Sherbert v. Verner, 374 U.S. 398, 413 (1963) (Stewart, J., concurring).

2 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. The first amendment freedoms were first incorporated into the fourteenth amendment and applied to the states in Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

3 Modern free exercise doctrine originated in Sherbert v. Verner, 374 U.S. 398 (1963). *See infra* notes 74-87 and accompanying text.

4 *See infra* notes 77-131 and accompanying text.

5 *See infra* notes 148-98 and accompanying text (discussion of Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988)); *see also* Employment Div. v. Smith, 110 S. Ct. 1595 (holding that the free exercise clause permits a state to prohibit sacramental peyote use and to deny unemployment benefits to persons discharged for such use), *reh'g denied*, 110 S. Ct. 2605 (1990). In *Smith*, the Court reversed the Oregon Supreme Court's holding that the first amendment protects good faith use of peyote for religious purposes even if state law does not permit its sacramental use. *See* Smith v. Employment Div., 307 Or. 68, 736 P.2d 146 (1988), *rev'd*, 110 S. Ct. 1595, *reh'g denied*, 110 S. Ct. 2605 (1990).

6 *See infra* notes 13-27 and accompanying text.

7 *See infra* notes 33-131 and accompanying text.

belief but allowing the state to regulate religious practices and conduct.[8] In later cases the Court applied strict scrutiny to protect religious practices and conduct by focusing on the effect of the offending regulation rather than the form of its burden.[9] In this way, the Court expanded protection of religious practices and conduct. In *Lyng v. Northwest Indian Cemetery Protective Association*,[10] however, the Court applied minimal scrutiny to a claim by American Indians that a proposed government road would destroy their sacred religious grounds and prevent their free exercise of religion.[11] *Lyng* held that laws that tend to discourage religious practice but do not coerce conduct contrary to religious belief need not meet a standard of strict scrutiny.[12] This Note argues that *Lyng* incorrectly based its analysis on the form of the regulation, disregarding its deleterious effect on the Indians' ability to freely exercise their religion. As a result, *Lyng* narrowed the scope of free exercise protection. This Note concludes that the Court should have focused on the effect of the burden and applied strict scrutiny to the challenged regulation in accordance with prior precedent.

I
BACKGROUND

A. The Elements of Free Exercise: Belief and Conduct

The free exercise clause guarantees individuals the freedom to hold any religious belief and the right to witness those beliefs in a manner consonant with their faith and conscience.[13] Although the language of the clause provides textual support for the protection of religious "exercise" or practice, the Supreme Court originally applied the guarantee of religious freedom only to belief.[14] The Constitution does not specify the nature or scope of religious freedom, and the First Congress's debates reveal little more than concern for

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8 *See infra* notes 33-45 and accompanying text (discussion of United States v. Reynolds, 98 U.S. 145 (1878)).

9 *See infra* notes 77-105 and accompanying text (discussion of Sherbert v. Verner, 374 U.S. 398 (1963)); *infra* notes 109-20 and accompanying text (discussion of Wisconsin v. Yoder, 406 U.S. 205 (1972)); *infra* notes 121-31 and accompanying text (discussion of Thomas v. Review Bd., 450 U.S. 707 (1981)).

10 485 U.S. 439 (1988).

11 *See infra* notes 148-198 and accompanying text (discussion of *Lyng*).

12 *Lyng*, 485 U.S. at 451.

13 *See* Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U.L. Rev. 391, 416 (1987) (discussing the first amendment guarantee of the substantive rights of religious liberty); *see also* Cantwell v. Connecticut, 310 U.S. 296, 303 (free exercise encompasses both belief and practice).

14 *See infra* notes 33-45 and accompanying text (discussion of United States v. Reynolds, 98 U.S. 145 (1878)).

the relationship between conscientious belief and its expression.[15] Nevertheless, the Court and commentators have recognized that the free exercise clause must protect religious conduct or it will fail to adequately safegnard the principal tenet of religious freedom—the freedom of belief.[16]

"True" free exercise claims involve religious conduct primarily and belief secondarily.[17] Most commentators recognize that a state can never successfully regnlate belief per se.[18] The characteristics of self-determination, free will, and rationality reflect qualities of autonomous human beings.[19] They define an inherent condition of freedom, a condition that the state can never directly regnlate. Viewed in this way, rights of free exercise are largely rights of autonomy.[20] For instance, laws can prevent one from acting in a certain way, but they cannot make one believe such action is morally wrong. Similarly, religious belief may prevent one from acting in a certain way even though the state does not proscribe the action. Only in an Orwellian nightmare could the state regnlate individual autonomy of thought.[21] Accordingly, government regnlations affecting religion necessarily focus on conduct, that is, on those actions that witness belief;[22] they can only indirectly impact belief itself. While individual autonomy may not itself provide the basis for significant

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15 MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 19 (1978).

16 *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) (free exercise designed to prevent undermining of religious practices); Sherbert v. Verner, 374 U.S. 398, 410 (1962) (state may not pressure individuals to abandon religious belief by conditioning receipt of benefits upon foregoing religious practices).

17 Ira C. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 772 n.155 (1986). "True" free exercise cases are decided solely on the basis of the free exercise clause and not in conjunction with other constitutional provisions such as free speech or equal protection. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (holding that a state may not deny unemployment benefits to religious convert whose employer discharged her for her subsequent refusal to work on the day of her Sabbath); Thomas v. Review Bd., 450 U.S. 707 (1981) (holding that a member of the Jehovah's Witnesses who quit his job in a steel foundry for religious reasons could not be denied unemployment benefits on the ground that his reason for quitting did not constitute 'good cause'); Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that compulsory school attendance law that conflicted with Amish religious practice violated free exercise clause); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that state may not deny unemployment benefits to Seventh-Day Adventist whose employer discharged her for her refusal to work on the day of her Sabbath).

18 *See* Lupu, *supra* note 13, at 416-17 n.93.

19 John Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 790-91 (1986); Lupu, *supra* note 13, at 422.

20 Lupu, *supra* note 13, at 422; *cf.* Garvey, *supra* note 19, at 801 (arguing that the free exercise gnarantee must protect values beyond those already associated with other constitutional freedoms).

21 *See* GEORGE ORWELL, NINETEEN EIGHTY-FOUR 6, 20 (1949) (imagining a futuristic world where Thought Police patrol for unorthodox thinking ("thoughtcrime")).

22 Lupu, *supra* note 13, at 416-17; Lupu, *supra* note 17, at 772 n.155.

free exercise protection,[23] it does provide a basis for the presumption that the free exercise clause protects religious conduct.[24] Governmental interference with religion can take the form of intentionally discriminatory treatment or a neutral state policy that has an indirect but offensive effect on religious belief and practice.[25] Religious liberty consists of both the right to be free from discriminatory treatment and the right of "conscientious objection," or exemption, from offensive state policy.[26] In the past twenty-five years the Court has sustained free exercise challenges to neutral state regulations that significantly burden sincere religious practices.[27] These cases evidence the Court's acknowledgement that protection of religious liberty requires that religious conduct be insulated from governmental interference.

B. Development of Free Exercise Doctrine

In the course of a hundred-year evolution of free exercise jurisprudence, the Court recognized that individuals' ability to conduct themselves in a manner consistent with the dictates of their faiths underlies the fundamental right of religious freedom. The Court's decisions acknowledged that the right to free exercise must extend to good faith religious conduct so that majoritarian legislatures do not, even inadvertently, sanction or discourage the beliefs of minority adherents.[28]

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23 See Garvey, *supra* note 19, at 790-92 for a discussion of why rights of autonomy do not provide an appropriate basis for protecting rights of free exercise. Garvey argues that autonomy rights are too general and would not distinguish between conduct based on sincere religious belief and conduct indicative of personal choice or philosophy.

24 *See* Paul Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217, 1234 (arguing that even a narrow definition of religion must encompass conduct as well as belief); Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 300-12 (arguing that the Court's decision in *Sherbert* established an independent meaning for the free exercise clause that extended protection to religiously motivated conduct as well as religious belief); *see also* cases cited *supra* note 17; Harrop Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 806 (1958) (arguing that the first amendment must protect actions based on individual conscience in order to keep society free and vital).

25 Lupu, *supra* note 13, at 416, 417.

26 *Id. But cf.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (free exercise clause does not exempt religious adherents from government policy simply because the offending policy makes religious practice more difficult).

Insulating religious groups from the effects of government policy has been controversial because recognizing such exemptions promotes religious, as opposed to secular, objections to state policy. Lupu, *supra* note 13, at 417; *cf.* William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 553-54 (arguing that treatment of all free exercise claims as free speech claims would avoid the controversy of according inconsistent treatment to religion and nonreligion).

27 *See* cases cited *supra* note 17.

28 *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

The Court's free exercise decisions also increasingly recognized that the effect, rather than the form, of an offensive regulation must control the constitutional analysis.[29] Traditionally, the Court had deferred to the legislature in free exercise challenges.[30] The Court later applied strict scrutiny, but only when the challenged regulation interfered directly with religious practices.[31] Finally, the Court applied strict scrutiny to regulations that indirectly burdened religious practices, thereby dramatically increasing the scope of free exercise protection.[32]

By directing the constitutional focus to the effect of regulations, the Court implicitly affirmed that the free exercise clause protects religious conduct. For instance, by striking down facially neutral laws that forced individuals to choose between government benefits and religious practices, the Court applied a conduct theory of free exercise. The challenged laws had no effect on belief. They offended the first amendment because they compelled religiously objectionable conduct.

1. *Restricted Exercise Rights*

Early Supreme Court decisions adopted a narrow interpretation of the free exercise clause. The Court interpreted free exercise rights as encompassing freedom of belief but not freedom of religiously motivated conduct.[33] The distinction between belief and conduct,[34] first announced in *Reynolds v. United States*,[35] allowed a state to regnlate religious conduct through legislation supporting the secular purpose of maintaining peace and order as long as the regulation did not explicitly prohibit a particular belief.[36]

Reynolds considered whether the constitutional guarantee of

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29 *See* cases cited *supra* note 28.

30 *See infra* notes 33-45 and accompanying text (discussion of United States v. Reynolds, 98 U.S. 145 (1878)).

31 *See infra* notes 53-73 and accompanying text (discussion of Braunfeld v. Brown, 366 U.S. 599 (1961)).

32 *See infra* notes 77-105 and accompanying text (discussion of Sherbert v. Verner, 374 U.S. 398 (1963)).

33 *See, e.g.*, Davis v. Beason, 133 U.S. 333 (1890) (upholding law prohibiting people who practice or advocate bigamy from voting); Reynolds v. United States, 98 U.S. 145 (1878) (upholding law prohibiting sacramental bigamy).

34 Commentators have criticized the "belief-conduct" distinction as an unrealistic interpretation of free exercise rights because a state can never successfully regulate belief per se. *See supra* text accompanying note 18.

35 98 U.S. 145, 166 (1878).

36 *Id.* at 164, 166; *see also* M. MALBIN, *supra* note 15, at 19-21 (discussing the draft versions of the free exercise clause). Althougb *Reynolds* appears to have relied on the congressional history of the religion clauses, the debates do not indicate that the framers supported a belief-conduct distinction. In fact, Madison, who introduced the words "free exercise" into the drafts, favored a broad protection of religious conduct. He supported protecting even conduct that "disturb[ed] the 'peace, happiness or safety' of so-

religious freedom permitted Reynolds to practice bigamy in violation of a federal criminal statute.[37] The Court held that religious freedom did not encompass the right to practice bigamy.[38] An examination of the history surrounding the drafting of the religion clause amendment led the *Reynolds* Court to conclude that the Constitution granted Congress legislative power over all actions that threatened the social order, but not power over opinion.[39]

Reynolds did not recognize that legislation aimed at maintaining social order might infringe free exercise rights. The Court's analysis of the constitutionality of sacramental bigamy began and ended by acknowledging that the legislature had proscribed bigamy.[40] The Court stated that some religious practices, such as human sacrifice, would fall within the realm of permissible government regulation.[41] It did not attempt to fashion a standard for evaluating when a prohibition against religious practice would infringe religious freedom. *Reynolds* refused to balance the potential effects on society that would result from exempting the sacramental practice of bigamy

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ciety unless the 'preservation of equal liberty and the existence of the State be *manifestly endangered.*' " *Id.* at 22.

37 *Reynolds*, 98 U.S. at 162. At trial Reynolds proved that he was a sincere and practicing Mormon and that his religion required him, when circumstances permitted, to practice bigamy or face damnation in the life to come. *Id.* at 161. In order to stem the flow of evil consequences that supposedly flowed from plural marriages, Congress outlawed bigamy in 1862. *Id.* at 168.

38 *Id.* at 165.

39 *Id.* at 164. The Court gave considerable attention to a statement by Thomas Jefferson in which he expressed his view of the constitutional guarantee:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.

Id. at 164 (quoting 8 JEFF. WORKS 113); *see* Braunfeld v. Brown, 366 U.S. 599, 604-05; *see also* M. MALBIN, *supra* note 15, at 25-29 (comparing Madison's and Jefferson's views of protecting religious beliefs).

40 *Reynolds*, 98 U.S. at 167 ("The only defence of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion: it was still belief, and belief only.").

41 *Id.* at 166-67; *cf. id.* at 167 ("[W]hen the offence consists of a positive act which is knowingly done, it would be dangerous to hold that the offender might escape punishment because he religiously believed the law wbich he had broken ought never to bave been made. No case, we believe, can be found that has gone so far."). *But see* Wisconsin v. Yoder, 406 U.S. 205 (1972) (striking down criminal statute that significantly interfered with claimants' free exercise of religion).

against the effect on the Mormon faith of proscribing bigamy.[42]

Reynolds also overlooked the relationship between religious practice or conduct and religious belief. The Court flatly declared that Reynolds's religious beliefs did not exempt his sacramental practice of bigamy from legislative proscription.[43] The Court's failure to examine the relationship between belief and conduct led to its failure to articulate a workable standard for evaluating the constitutionality of laws that prohibit certain religious practices.[44] Consequently, the *Reynolds* standard turned on the legality of the conduct as determined by the legislature.[45]

2. *Evolution of an Independent Standard for Free Exercise Protection*

During the first half of the twentieth century, the Court continued to deny free exercise challenges to laws that could be characterized as reasonable exercises of state police power aimed at significant secular ends.[46] The Court invalidated laws that interfered with free exercise only when the laws also violated other constitutional provisions. For instance, prior to 1940 the Court decided cases involving free exercise rights under the fourteenth amendment's due process clause.[47] After *Cantwell v. Connecticut*[48] held that the fourteenth amendment incorporated first amendment freedoms, the Court used the first amendment to strike down many state stat-

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42 Marcus, *supra* note 24, at 1218 n.9. The *Reynolds* court noted the long tradition of criminal prohibitions against certain marriages in the Northern and Western European countries as well as in the American colonies and states. The Court relied on this history in deciding that the framers did not intend the guarantee of religious freedom to prohibit legislation against polygamy. *Reynolds*, 98 U.S. at 164-65.

43 *See supra* note 41; *cf.* Davis v. Beason, 133 U.S. 333, 342-43 (1890) ("However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.").

44 The Mormon faith's subsequent renunciation and banning of polygamy has largely mooted the bigamy issue in the free exercise context. Nevertheless, the cases in this area are significant in their failure to weigh the effect that banning the practice may have had on the Mormon faith against the interests of society. Marcus, *supra* note 24, at 1218 n.9.

45 *Cf.* Employment Div. v. Smith, 110 S. Ct 1595, *reh'g denied*, 110 S. Ct. 2605 (1990), discussed *supra* note 5.

46 *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 168-70, *reh'g denied*, 321 U.S. 804 (1944) (state's interest in the health and moral well-being of children constituted a significant secular end that justified the indirect burden on free exercise).

47 *See, e.g.*, Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934) (holding that a state university does not violate the due process clause by requiring male students to take courses in military training), *reh'g denied*, 293 U.S. 633 (1935); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (striking down statute requiring parents to send their children to public schools). *See generally* JOHN E. NOWAK, RONALD D. ROTUNDA & J. NELSON YOUNG, CONSTITUTIONAL LAW 1053-55 (2d ed. 1983) [hereinafter NOWAK] (detailed discussion of this line of cases).

48 310 U.S. 296 (1940) (striking down statute requiring permit for religious solicitation).

utes that attempted to regulate the free exercise of religion.[49] The Court, however, emphasized the infringement of free speech rights rather than the infringement of free exercise rights. Furthermore, the Court upheld government regulations that advanced secular goals regardless of their coercive effect on the free exercise of religion.[50] Prior to the 1961 *Braunfeld v. Brown*[51] decision, the Court had not fashioned a standard for evaluating legislative enactments that restricted free exercise rights.[52]

a. *Emergence of the Rational Basis Standard.*

In *Braunfeld v. Brown*[53] the Court considered whether a Sunday closing law infringed the free exercise of religion. Abraham Braunfeld was an Orthodox Jew whose religion required him to observe his Sabbath on Saturday.[54] In order to compensate for the loss of Saturday business, Braunfeld kept his business open on Sunday in violation of the Sunday closing law.[55] Although Braunfeld alleged he would lose his business if forced to comply with the law, the Court held that the indirect effect of the otherwise neutral law did not infringe upon his free exercise of religion.[56]

Braunfeld argued that the law was unconstitutional for several reasons. Braunfeld stated that he did a substantial amount of business on Sunday to compensate for closing on Saturday to observe his Sabbath.[57] Braunfeld contended that if his business closed for the entire weekend, he would suffer substantial economic loss, to the benefit of his non-Sabbatarian competitors.[58] As a result of having to close on Sunday, Braunfeld would suffer an economic disadvantage sufficient to force him to open his business on Saturday and thereby violate a basic tenet of his religion.[59]

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49 *See, e.g.*, Follet v. Town of McCormick, 321 U.S. 573 (1944) (striking down license tax as applied to religious solicitation); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (striking down license tax as applied to religious solicitation); Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding non-discretionary parade licensing system). *See generally* NOWAK, *supra* note 47, at 1056 (more detailed discussion of this line of cases).

50 NOWAK, *supra* note 47, at 1057.

51 366 U.S. 599 (1961).

52 *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding a law prohibiting accompanied minors from selling religious merchandise in public). *See generally* NOWAK, *supra* note 47, at 1056-57 (discussing *Prince* in the context of the development of free exercise doctrine).

53 366 U.S. 599 (1961).

54 *Id.* at 601.

55 PA. STAT. ANN. tit. 18, § 4699.10 (Purdon Cum. Supp. 1960) (repealed 1972) provided that a violation of the Sunday closing law was punishable with a fine of up to $100 for the first offense. *Braunfeld*, 366 U.S. at 600 n.1.

56 *Braunfeld*, 366 U.S. at 601, 609.

57 *Id.* at 602.

58 *Id.*

59 *Id.* Braunfeld further contended that the statute's effect would hinder his reli-

Chief Justice Warren, writing for a plurality of four Justices,[60] announced a new standard for determining when a state regulation placed an impermissible burden on free exercise. The Chief Justice stated that regulations rationally related to a secular legislative end do not violate free exercise rights.[61] He also stated that indirect burdens on free exercise would not be deemed constitutional unless the state could not accomplish its goal by less restrictive means.[62] A total of six Justices[63] agreed that the public need for a Sunday day of rest constituted a secular goal justifying the burden on Braunfeld's religious practices.[64]

b. *The Case for Strict Scrutiny.*

Dissenting in *Braunfeld*, Justice Brennan framed the issue as whether a State may force an individual to choose between his occupation and his religion.[65] Although the law did not explicitly compel or prohibit any religious practice, Justice Brennan argued that it prevented any Orthodox Jew from competing effectively with Sunday-observing tradesmen.[66] Justice Brennan believed that such a law inhibited the free exercise of religion by pressuring an individual to abandon his religious beliefs.[67]

Justice Brennan disagreed with Chief Justice Warren's use of a rational basis standard for determining when a statute violates the free exercise clause and argued for strict scrutiny instead. The Court had previously held that legislation that offends the first amendment free speech clause must meet a standard of strict scrutiny.[68] Justice Brennan argued that the state did not demonstrate a

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gion in gaining new adherents and therefore subjected his religion to discriminatory treatment by the state. *Id.*

60 Black, Clark and Whittaker, JJ., joined Chief Justice Warren's opinion.

61 *Braunfeld*, 366 U.S. at 607.

62 *Id.*

63 Frankfurter, J., joined by Harlan, J., concurred in the judgment but wrote separately.

64 *Braunfeld*, 366 U.S. at 607, 609.

65 *Id.* at 611 (Brennan, J., dissenting). Justices Douglas and Stewart also dissented from the plurality opinion, finding that the Sunday closing law unduly burdened Braunfeld's free exercise of religion. *See id.* at 561 (Douglas, J., dissenting), 616 (Stewart, J., dissenting).

66 *Id.* at 613 (Brennan, J., dissenting).

67 *See id.* at 611, 613; *cf.* Sherbert v. Verner, 374 U.S. 398, 404 (1963) (governmental imposition of choice between accepting benefits or adhering to religious belief violates free exercise clause).

68 *See, e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946); Jones v. City of Opelika, 319 U.S. 103 (1943).

Cantwell v. Connecticut, 310 U.S. 296, held in 1940 that the individual liberties guaranteed by the first amendment apply to the states through the due process clause of the fourteenth amendment. *See supra* note 48 and accompanying text. Where legislation is challenged on due process grounds because the statute is allegedly too vague, courts

compelling interest and thus could not justify the substantial, though indirect, infringement on Braunfeld's ability to freely exercise his religion.[69] He distinguished *Reynolds* by noting that there the state had possessed a strong interest in prohibiting polygamy, a practice "deeply abhorred" by society.[70]

Justice Brennan rejected the state's justification for the law's burden on religion. He argued that Braunfeld's conduct satisfied the state's secular interest in preserving a day of rest for the well-being of its citizens[71]—in fact, Braunfeld's religion required such a day.[72] Justice Brennan concluded that mere "administrative convenience" should never be a sufficiently "rational" basis for an otherwise discriminatory law.[73]

3. *Application of Strict Scrutiny to Free Exercise Challenges*

The Court re-examined Chief Justice Warren's *Braunfeld* reasoning only two years later, in *Sherbert v. Verner*.[74] There, after dissenting in *Braunfeld*, Justice Brennan found a majority voice for his belief that the first amendment values the preservation of personal liberty over the fulfillment of collective goals.[75] Although *Sherbert* did not explicitly overrule *Braunfeld*, the reasoning of the *Braunfeld* dissenters controlled the analysis in *Sherbert*.[76]

a. *Free Exercise Precedent: the "Compelling Interest" Standard.*

In *Sherbert v. Verner*, the Court ruled that South Carolina could not deny unemployment benefits to a Seventh-Day Adventist who lost her job for refusing to work on her Saturday Sabbath.[77] South Carolina's unemployment benefits eligibility law provided that a

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use the rational basis standard of review. However, if the legislation is also challenged on the grounds that it violates the first amendment, courts will use the higher strict scrutiny standard, which is normally applied to first amendment challenges. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 630 (1943), *overruling* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

69 *See Braunfeld*, 366 U.S. at 613-14 (Brennan, J., dissenting).

70 *Id.* at 614. See *supra* notes 35-45 and accompanying text for a discussion of *Reynolds*.

71 *Braunfeld*, 366 U.S. at 602-03.

72 *Id.* at 601.

73 *Id.* at 615-16 (Brennan, J., dissenting) ("[T]he Court, in my view, has exalted administrative convenience to a constitutional level high enough to justify making one religion economically disadvantageous.").

74 374 U.S. 398 (1963). It is worth noting that the Court decided *Sherbert* only two years after *Braunfeld*, and that three of the four Justices in Warren's plurality (Whittaker had been replaced by White, who dissented in *Sherbert*) joined Brennan's majority in *Sherbert*, including Warren himself. Frankfurter, who had concurred in *Braunfeld*, had been replaced by Goldberg, who joined Brennan in *Sherbert*.

75 *See Braunfeld*, 366 U.S. at 610 (Brennan, J., dissenting).

76 *See infra* note 85.

77 *Sherbert*, 374 U.S. at 398. Sherbert filed for unemployment compensation bene-

claimant must be "able" to work and "available" for work.[78] The law also provided that a claimant would be ineligible for benefits if she failed to accept suitable work without good cause.[79] The South Carolina Supreme Court had rejected Sherbert's contention that the disqualifying provisions of the unemployment statute abridged her right to freely exercise her religion.[80] The state court held that the statute did not prevent Sherbert from observing her religious beliefs in accordance with the dictates of her conscience.[81]

The United States Supreme Court reversed the South Carolina Supreme Court by a 7-2 margin, holding that the denial of unemployment benefits imposed an impermissible burden on Sherbert's free exercise rights.[82] Writing for the majority, Justice Brennan argued that the South Carolina statute pressured Sherbert to work on her Sabbath.[83] It forced her to choose between abandoning the precepts of her religion by accepting work on her Sabbath day or following her religion and forfeiting the unemployment benefits.[84] Justice Brennan viewed South Carolina's imposition of this choice as equivalent to a fine imposed against Sherbert for Saturday worship.[85] Furthermore, Justice Brennan rejected South Carolina's attempt to justify the statute on the grounds that the unemployment benefits were merely a privilege and not a right: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[86] He concluded that conditioning the availability of unemployment benefits upon Sherbert's willingness to violate a principal tenet of her religion indirectly penalized her constitutional right

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fits after unsuccessfully seeking employment that did not require Saturday work. *Id.* at 399 n.2.

78 *Id.* at 400 n.3.

79 *Id.*

80 Sherbert v. Verner, 240 S.C. 286, 303-04, 125 S.E.2d 737, 746 (1962), *rev'd*, 374 U.S. 398 (1963).

81 *Id.*

82 *Sherbert*, 374 U.S. at 403-04.

83 *Id.* at 404.

84 *Id.*

85 *Id.* Justice Stewart expressed a similar view in his *Braunfeld* dissent:

> Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand . . . I think the impact of this law upon these appellants grossly violates their constitutional right to the free exercise of their religion.

Braunfeld, 366 U.S. 599, 616 (1961) (Stewart, J., dissenting).

86 *Sherbert*, 374 U.S. at 404. Even gratuitous public benefits cannot be conditioned if that inhibits the exercise of first amendment freedoms. *See* Speiser v. Randall, 357 U.S. 513 (1958) (striking down conditions which limited a tax exemption to those people who pledged their alliance to the state government providing the exemption).

to the free exercise of religion.[87]

b. Sherbert *Rejects* Braunfeld's *Reasoning and Accords Strict Scrutiny to Indirect Burdens.*

Braunfeld deferred to the legislature's secular goals by upholding a Sunday closing law that indirectly burdened religious practices. The plurality acknowledged that a law that indirectly obstructed religious observances or discriminated between religions would be unconstitutional.[88] But the plurality strictly qualified this acknowledgement by permitting indirect burdens on religious observance by laws rationally related to a secular purpose and imposed through the least restrictive means.[89]

In *Sherbert*, Justice Brennan rejected *Braunfeld*'s reasoning and announced a new standard of review for free exercise challenges: when a law burdens religious practices, the state must show a compelling interest in the regulation that outweighs even an indirect burden on free exercise.[90] Justice Brennan's inquiry began rather than ended by recognizing that the denial of benefits was only an indirect result of the state's welfare legislation.[91] He noted that the language of the first amendment focuses on laws that *prohibit* free exercise of religion,[92] and that a law neutral on its face but discriminatory in its application does not *prohibit* free exercise in the same sense as a direct criminal prohibition. Nevertheless, Justice Brennan believed that a law that burdened religious practice would affect an individual's free exercise to the same extent whether the state

87 *Sherbert*, 374 U.S. at 406.

88 *Braunfeld*, 366 U.S. at 607. A direct burden results when a law criminalizes a religious practice. For a discussion of direct and indirect burdens, see Marcus, *supra* note 24.

89 *Braunfeld*, 366 U.S. at 607.

90 *Sherbert*, 374 U.S. at 404. The *Braunfeld* court had refused to take this step: "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld*, 366 U.S. at 606.

91 "[I]t is true that no criminal sanctions directly compel [Sherbert] to work a six-day week. But this is only the beginning, not the end, of our inquiry." *Sherbert*, 374 U.S. at 403-404. Brennan continued, "For '[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.' " *Id.* at 404 (quoting *Braunfeld*, 366 U.S. at 607). The *Braunfeld* plurality acknowledged the seriousness of even indirect burdens on religious practice but refused to strike down laws that the state enacted in pursuit of secular goals, regardless of the effect of those laws on religious practices. *See supra* note 90.

92 "Congress *shall make no law* respecting tbe establishment of religion, or *prohibiting* the free exercise thereof; or *abridging* the freedom of speech . . . ." U.S. CONST. amend. I (emphasis added).

characterized the burden as direct or indirect.[93] Thus, in a major departure from *Braunfeld*, Brennan required South Carolina to show a compelling state interest that would justify even an incidental burden on Sherbert's free exercise of religion.[94]

Significantly, the South Carolina law also provided that when a national emergency required the governor to temporarily lift the Sunday labor laws, employers could not discriminate against employees who might be conscientiously opposed to Sunday work.[95] Under the statute, employers could not terminate Sunday worshipers for refusing to work on their Sabbath, yet Sherbert was discharged because she would not work on Saturday, the day of her Sabbath.[96] Justice Brennan found that this religious discrimination compounded the already unconstitutional denial of benefits to Sherbert.[97] This finding marked another departure from *Braunfeld*, where the Court found that requiring everyone to observe Sunday as the Sabbath constituted not only fair treatment but even a legitimate secular purpose.

South Carolina justified the infringement on Sherbert's religious freedom by arguing that a decision in her favor could lead to the filing of fraudulent claims by people feigning religious objections and the dilution of the unemployment compensation fund.[98] Justice Brennan rejected this argument as too speculative and insubstantial to justify burdening free exercise.[99] He reiterated the new strict scrutiny standard, leaving little doubt that *Sherbert* had rejected the reasoning of *Braunfeld*: "It is basic that no showing merely of a rational relationship to some colorable state interest would [justify substantial infringement of First Amendment rights]; in this highly sensitive constitutional area, '[o]nly the gravest abuses . . . give occa-

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93 For instance, if South Carolina had a law requiring everybody to work on Saturday or face criminal sanction, Sherbert would have had to work on Saturday against the dictates of her religion. The law in question had the same effect, because in order to support herself, if Sherbert could not get unemployment compensation, she would have to accept employment requiring her to work on her Sabbath.

Justice Brennan added that free speech analysis does not end with the determination that a law does not impose a direct prohibition on speech or assembly: "Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes." *Sherbert*, 374 U.S. at 404 n.5 (citations omitted).

94 *Id.* at 403.

95 *Id.* at 406.

96 *Id.* at 399.

97 *Id.* at 406.

98 *Id.* at 407.

99 *Id.* Even if the possibility of fraudulent claims did threaten the viability of the fund, the state would still need to demonstrate that no less restrictive forms of regulation could prevent the dilution without abridging first amendment rights. *Id.* The Court rejected this argument again in Thomas v. Review Bd., 450 U.S. 707 (1981). *See infra* text accompanying note 130.

sion for permissible limitation.' "[100] *Sherbert*'s holding left little doubt that the Court believed the effect, rather than the form, of a burden on religion controlled the constitutional analysis.

c. Braunfeld *Left in Suspended Animation.*

Under the reasoning announced in *Sherbert*, Braunfeld would have prevailed on his free exercise claim. As Justice Brennan stated in *Sherbert*, forcing[101] all people to observe a particular day as their Sabbath discriminates against adherents who observe their Sabbath on a different day than does the majority of the legislature.[102] The state's interest in providing a common day of rest, like the state's interest in preventing welfare fraud, represents a collective goal which would not justify infringing an individual's free exercise rights.[103] If anything, the impact of the law challenged in *Sherbert* was less onerous than the law challenged in *Braunfeld*.[104]

Justice Brennan declined to seize the opportunity in *Sherbert* to overrule *Braunfeld*, even though three of the four Justices writing separately stated that *Sherbert* necessarily overruled *Braunfeld*.[105] Nevertheless, the precedent set in *Sherbert* marked a significant shift from the reasoning in *Braunfeld*. *Sherbert*'s failure to overrule *Braunfeld* left open the possibility that the Court could return to the *Braunfeld* rational basis standard without formally overruling *Sherbert*.

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100 *Sherbert*, 374 U.S. at 406 (citation omitted). *Contra Braunfeld*, 366 U.S. at 607 (state may regulate conduct by enacting a law that indirectly burdens religious observance if purpose and effect of law is to advance state's secular goals).

101 Brennan stated in *Sherbert* that incidental burdens on religious observance have the effect of forcing an adherent to choose between following the tenets of his religion or abandoning them in order to receive the conditioned benefit. *See supra* note 93 and accompanying text.

102 *Sherbert*, 374 U.S. at 406.

103 *Id.* at 407; *Braunfeld*, 366 U.S. at 610, 613-16 (Brennan, J., dissenting). *But cf.* United States v. Lee, 455 U.S. 252 (1982) (refusing Amish workmen whose religion forbade them to pay social security taxes or receive benefits an exemption from compulsory participation in the social security system).

104 Mrs. Sherbert would have lost only a few months of unemployment compensation, whereas Braunfeld faced the loss of his entire business investment. *Sherbert*, 374 U.S. at 417 (Stewart, J., concurring in part and dissenting in part); *id.* at 421 (Harlan and White, JJ., dissenting).

105 *Sherbert*, 374 U.S. at 417 (Stewart, J., concurring in the result); *id.* at 421 (Harlan and White, JJ., dissenting). One of the reasons Stewart did not join the Court's opinion was because it did not overrule *Braunfeld*. *Id.* at 417; *see also* Marcus, *supra* note 24, at 1239 (arguing that although Brennan did not expressly overrule *Braunfeld*, the majority in *Sherbert* rejected its reasoning).

Instead of overruling *Braunfeld*, Brennan unconvincingly attempted to distinguish it from *Sherbert*, relying on arguments made by the *Braunfeld* plurality that Brennan himself had fiercely attacked in his dissent and even rejected earlier in the *Sherbert* opinion. Perhaps Justice Brennan sensed that Chief Justice Warren, part of Brennan's five-man majority, might have found it unpalatable to join an opinion that overruled *Braunfeld*, an opinion the Chief Justice had written only two years earlier.

Such a return would radically restrict first amendment free exercise protection.

4. *Expansion of Free Exercise Doctrine*

After *Sherbert*, the Court used the free exercise clause to strike down several laws that both directly and indirectly burdened religious practices. In *Wisconsin v. Yoder*,[106] the Court invalidated a criminal statute that interfered with Amish religious tradition. In *Thomas v. Review Board*,[107] the Court struck down a state welfare law that denied unemployment benefits to an individual who quit his job for religious reasons.[108] *Sherbert*'s strict scrutiny standard figured prominently in these decisions.

a. *Religiously Motivated Conduct Outweighs Criminal Prohibition.*

In *Wisconsin v. Yoder*,[109] the Court considered whether a Wisconsin compulsory education statute violated the Amishs' free exercise rights. As the Mormon faith once mandated the practice of polygamy, the Old Order Amish communities believed that spiritual salvation required a separation from contemporary society.[110] The Amish did not send their children to school beyond the eighth grade because they feared that public school attendance exposed their children to worldly influences that would undermine the Amish community and religion.[111] Jonas Yoder, an Amish farmer, was convicted for refusing to send his children to school in accordance with the statute.[112] The Wisconsin Circuit Court affirmed the conviction, but the Wisconsin Supreme Court reversed,[113] sustaining Yoder's free exercise claim. In a lengthy opinion by Chief Justice Burger, the Supreme Court affirmed. Following the *Sherbert* analysis, Chief Justice Burger sought to determine whether the Wisconsin law burdened Amish religious practices, and if so, whether a compelling state interest existed to justify the burden. The Chief Justice found that the Amish belief in a way of life detached from contemporary

106 406 U.S. 205 (1972).

107 450 U.S. 707 (1981).

108 *See also* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (striking down another state welfare law that denied unemployment benefits to an individual who was fired after converting to a religion that observed the Sabbath on Saturday).

109 406 U.S. 205 (1972).

110 Comment, *The Amish and Compulsory School Attendance: Recent Developments*, 1971 WIS. L. REV. 832 (authored by Norman Prance).

111 *Yoder*, 406 U.S. at 217-18.

112 WIS. STAT. § 118.15 (1969) provided that any person having under his control a child between the ages of 7 and 16 should cause such a child to regularly attend public or private school or suffer a fine of not less than $5 nor more than $50, imprisonment for not more than 3 months, or both. *Yoder*, 406 U.S. at 207 n.2.

113 49 Wis. 2d 430, 182 N.W.2d 539 (1971), *aff'd*, 406 U.S. 205 (1972).

worldly society was central to the Amish faith.[114] He concluded that forcing Amish children to attend high school and exposing them to worldly influences at the crucial adolescent stage would substantially interfere with the development of their faith.[115]

The Court noted that Wisconsin's professed interest in ensuring that its children receive a basic level of education represented a strong and neutral state interest.[116] Chief Justice Burger, however, found the vocational training that Amish children undertook upon their return to their community sufficient to satisfy Wisconsin's interest.[117] He concluded that Wisconsin's strong interest in protecting its children from growing up in ignorance did not outweigh the deleterious effect that enforcing the compulsory attendance law would have on the Amish religion.[118]

In recognizing that Wisconsin's attendance law violated the Amish's free exercise rights, the Court reaffirmed its commitment to protecting individuals from both direct and indirect infringements on free exercise rights.[119] The impact of the law in *Yoder* was directly coercive, yet the Court relied on *Sherbert* for the proposition that a facially neutral regulation will violate the constitutional guarantee of free exercise if its operation threatens to undermine religious practices.[120]

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114 *Yoder*, 406 U.S. at 210. *Yoder* implies that regulations which infringe upon practices "central" to a religious belief constitute a burden to that religious practice siguificant enough to trigger strict scrutiny review. *Id.* American Indians, however, have been unsuccessful in attempting to rely on this "centrality" theory to invoke constitutional protection of their free exercise rights with respect to public land use. *See, e.g.*, Wilson v. Block, 708 F.2d 735 (D.C. Cir.) (dismissing American Indian protest of development of a ski resort area that would interfere with sacred ceremonies), *cert. denied*, 464 U.S. 956 (1983); Crow v. Gullet, 706 F.2d 856 (8th Cir.) (rejecting American Indian claim for injunctive relief based on their contentions that state regulation of access to sacred religious grounds violated the free exercise clause), *cert. denied*, 464 U.S. 977 (1983); *see also* Dean Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 AM. INDIAN L. REV. 1, 2-3 (1982) ("the courts have not yet found an Indian religious practice to be 'central' when the use of public lands is at issue").

115 *Yoder*, 406 U.S. at 218. Burger emphasized the differences between contemporary society and Amish society: "The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness .... Amish society emphasizes ... a life of 'goodness,' rather than a life of intellect; wisdom, rather than tecbnical knowledge; community welfare, rather than competition." *Id.* at 211.

116 *Id.* at 221.

117 After eighth grade, Amish children return to their community to acquire Amish attitudes favoring manual work, self-reliance, and the skills needed to fit the role of Amish housewife or farmer. The Amish develop these skills, which have perpetuated the Amish society for 300 years, in a "learn-through-doing" manner. *Id.* at 211, 219.

118 *Id.* at 234.

119 *Id.* at 220.

120 *Id.* at 218. *But see* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 457 (1988) (regulation must be coercive to merit strict scrutiny).

b. *Individual Exemption From State Regulation.*

In 1981 the Court applied *Sherbert* again in *Thomas v. Review Board.*[121] Eddie Thomas, a Jehovah's Witness employed in a steel foundry, quit his job for religious reasons when he learned that the steel he fashioned was being used to produce armaments.[122] The Indiana Employment Commission denied unemployment compensation benefits to Thomas, claiming that his voluntary dismissal did not constitute "good cause" as defined by the unemployment compensation statute.[123] The Supreme Court of Indiana affirmed, finding that Thomas quit for personal reasons and therefore did not qualify for benefits or for protection under the first amendment.[124]

Chief Justice Burger led the majority in overruling the Indiana Supreme Court with a straightforward application of *Sherbert*.[125] Like the statute in *Sherbert*, the neutral Indiana law did not *compel* Thomas to abandon his religious practices with a threat of criminal sanction.[126] But as *Sherbert* noted, this finding only begins the inquiry.[127] *Thomas* reaffirmed that the effect of a law rather than its form controls the constitutional analysis. Thus, even a neutral regulation may be unconstitutional if it unduly burdens free exercise rights.[128] Chief Justice Burger found the coercive impact on Thomas indistinguishable from that in *Sherbert*, noting that although the compulsion was indirect, the infringement upon free exercise was nevertheless substantial.[129]

As in *Sherbert*, the *Thomas* Court found that Indiana had failed to

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121 450 U.S. 707 (1981).

122 Thomas's religious beliefs specifically precluded him from directly aiding in the production of military weapons. *Id.* at 711.

123 IND. CODE § 22-4-15-1 (Supp. 1978) provides in relevant part: "[a]n individual who has voluntarily left his employment without good cause in connection with the work or who was discharged from his employment for just cause shall be ineligible for waiting period or benefit rights . . . ."

According to the Indiana Supreme Court, "Good cause which justifies voluntary dismissal must be job-related and objective in character." *Thomas*, 450 U.S. at 712-13.

124 *Thomas*, 450 U.S. at 713. The state court also held that even if Thomas did quit for religious reasons, religion did not constitute "good cause" objectively related to work under Indiana law. *Id.* Furthermore, the court held that any indirect burden on appellant's religion was justified by the state's legitimate interest in preserving the integrity of the insurance fund and discouraging employees from quitting work for personal reasons. *Id.*

125 See *infra* note 131 for a discussion of Justice Rehnquist's dissenting views.

126 *Cf. Yoder*, 406 U.S. 205 (1972) (the Amish had to choose between abandoning their beliefs or subjecting themselves to criminal sanction); *Braunfeld*, 366 U.S. 599 (1961) (Braunfeld had to choose between staying open on Sunday in violation of the Sunday closing laws or working on Saturday in violation of his Sabbath).

127 *See supra* note 91.

128 *Thomas*, 450 U.S. at 717 (citing *Yoder*, 406 U.S. at 220).

129 *Id.* at 717-18. The Court rejected an attempt to distinguish *Sherbert* on the grounds that Thomas had voluntarily quit whereas Sherbert had been dismissed by the employer, reasoning that had Thomas presented himself at the job but refused to work,

provide convincing evidence that Thomas' claim jeopardized the unemployment insurance fund or that large numbers of workers would find themselves in Thomas' predicament, thereby creating widespread unemployment.[130] Accordingly, the Court found that Indiana had not met its burden of showing that its statute presented the least restrictive means of achieving an overriding state interest.[131]

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he would have been dismissed. *Id.* at 718; *see* John Garvey, *Freedom and Equality in the Religion Clauses*, 1981 SUP. CT. REV. 193.

130 *Thomas*, 450 U.S. at 717.

131 In both *Sherbert* and *Thomas*, the Court acknowledged a tension between the free exercise clause and the establishment clause of the first amendment. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."). By forcing a state to pay benefits to an individual to accomodate that individual's religious beliefs, the Court appeared to be on a collision course with the Constitution's prohibition against establishment of religion. In *Sherbert* and *Thomas*, the Court confidently asserted that by recognizing exemptions based on the free exercise clause it was not fostering the establishment of religion. *Thomas*, 450 U.S. at 719 (citing *Sherbert*, 374 U.S. at 409). Rather, the Court believed that in extending benefits to Saturday as well as Sunday worshippers, it fostered no more than "the governmental obligation of neutrality in the face of religious differences, and [did] not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." *Id.* at 720.

Justice Rehnquist, however, dissenting in *Thomas*, blamed the existence of the tension between the religion clauses on the Court's overly expansive interpretion of both clauses. "The [*Thomas* decision] illustrates how far astray the Court has gone in interpreting the [Religion] Clauses of the First Amendment . . . . Just as it did in Sherbert v. Verner . . . the Court today reads the Free Exercise Clause more broadly than is warranted." *Thomas*, 450 U.S. at 722. Justice Rehnquist accepted the *Braunfeld* decision and the dissent in *Sherbert* as the proper interpretation of the free exercise clause, rejecting the application of strict scrutiny to general statutes that have the purpose and effect of advancing the state's secular goals. *See* P. KURLAND, RELIGION AND LAW 40-41 (1962) (arguing that a court may not invalidate a law on free exercise grounds unless it is also invalidated as to nonreligious individuals—otherwise the court would violate the establishment clause); *see also* Marcus, *supra* note 24, at 1236 (argning that Professor Kurland's broad view of the establishment clause has never been accepted by the American judiciary, perhaps because it would emasculate the free exercise clause).

Dissenting in *Sherbert*, Justices White and Harlan argued that states must now "*single out* for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior . . . is not religiously motivated." *Sherbert*, 374 U.S. at 422 (emphasis in original). The dissent's comparison, however, is misleading. The individuals "singled out" in these cases represent minority religious adherents who have been denied benefits as an indirect result of their religious beliefs. If they are "singled out" for any purpose, it is to acknowledge that their religious freedom has been infringed, a freedom that has classically been highly valued in our society. *See* Marcus, *supra* note 24, at 1218; *see also* Gillette v. United States, 401 U.S. 437, 454 (1971) (stating that providing religious exemptions is not inconsistent with neutrality as long as the exemption is broad enough to reflect valid secular purposes). *But see* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (holding that a statute that provides Sabbath workers with an unqualified right not to work on their chosen Sabbath violates the establishment clause).

In *Sherbert* Justice Douglas acknowledged the precarious position of the minority adherent:

5. *The Majority Divides: Pulling in the Reins?*

A split occurred in the Court's collective interpretation of free exercise doctrine in *Bowen v. Roy*.[132] *Roy* considered whether the government's use of a social security number in its computer systems violated the free exercise clause. Stephen Roy, a member of the Abenaki Indian Tribe, objected to the government's use of the social security number issued in the name of his two-year-old daughter, Little Bird of the Snow. He claimed that use of the number would "rob the spirit" of his daughter and prevent her, as well as his own, free exercise of religion.[133] Roy obtained an injunction in federal district court permanently restraining the state and federal governments from using the number. The court also enjoined the government from refusing to provide benefits because of Roy's refusal to provide his daughter's social security number.[134] Chief Justice Burger, writing for the Court, held that the government's use of a social security number in the administration of its benefit plans did not infringe Roy's or his daughter's free exercise rights.[135] The free exercise clause, he reasoned, did not require the government to conduct its own internal affairs in ways that comport with the religious beliefs of individual citizens.[136]

> [M]any people hold beliefs alien to the majority of our society—beliefs that are protected by the First Amendment but which could easily be trod upon under the guise of "police" or "health" regulations reflecting the majority's views.
>
> Some have thought that a majority of a community can, through state action, compel a minority to observe their particular religious scruples so long as the majority's rule can be said to perform some valid secular function.

Sherbert, 374 U.S. at 411-12 (Douglas, J., concurring in part and dissenting in part).

Requiring strict scrutiny for laws that burden religious practices simply protects minorities against the legislature's natural and unconscious bias toward its own views. However, Justice Rehnquist's dissent in *Thomas* represented an ominous fissure in the Court's collective interpretation of the free exercise clause.

132 476 U.S. 693 (1986).

133 *Id.* at 696. Roy testified at trial why the use of his daughter's social security number would be contrary to his religious beliefs as a native Abenaki:

> [W]e felt that this number would be used to rob her of her ability to have greater power in that this number is a unique number. It serves unique purposes. It's applied to her and only her; and being applied to her, that's what offends us, and we try to keep her person unique, and we're scared that if we were to use this number, she would lose control of that and she would have no ability to protect herself from any evil that the number might be used against her.

Id. at 697 n.3.

134 Roy v. Cohen, 590 F. Supp. 600 (M.D. Pa. 1984).

135 *Roy*, 476 U.S. at 700.

136 *Id.* at 699. " '[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.' " *Id.* at 700 (quoting *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)).

Chief Justice Burger likened Roy's claim to a sincere religious objection to the size

Although a majority of the Court believed that the government's use of Little Bird's social security number did not impair Roy's free exercise of religion, the Court was divided over the issue of whether requiring Roy to provide his daughter's social security number to obtain government benefits violated the free exercise clause. The Chief Justice, joined by only two other Justices, concluded that the requirement did not infringe Roy's free exercise rights.[137] Chief Justice Burger distinguished between administrative and prohibitory regulations, reasoning that a uniformly applicable and neutral statute that forces an individual to choose between governmental benefits or adherence to religious beliefs differs completely from a direct prohibition that criminalizes religiously motivated activity.[138] He argued that administrative regulations that are wholly neutral and uniformly applicable do not burden religious freedom where no government compulsion is involved.[139] Chief Justice Burger even suggested that absent proof of discriminatory intent, the government could meet its burden in free exercise challenges by demonstrating that the challenged regulation was uniform in its application and a reasonable means of promoting a legitimate public interest.[140]

Justice O'Connor, joined by Justices Brennan and Marshall, sharply criticized Chief Justice Burger for invoking this new standard, noting that the test had no basis in precedent.[141] The *Sherbert* court had rejected the same reasoning, holding that the governmental imposition of the choice between receiving benefits or adhering to religious belief was tantamount to a direct prohibition against that belief.[142] Chief Justice Burger's analysis, squarely in conflict with *Sherbert*, relegated free exercise protection to the lowest level of scrutiny already provided by the equal protection clause.[143]

With the exception of Justice Stevens, who concluded that the issue was moot,[144] the remaining five Justices believed that *Sherbert*

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or color of the government's filing cabinets. *Id.* The Chief Justice stated that the free exercise clause "affords an individual protection from certain governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.*

137 *Id.* at 712 (Burger, C.J., joined by Powell and Rehnquist, JJ.).

138 *Id.* at 703-06. *But see* Sherbert v. Verner, 374 U.S. 398 (1963) (holding that governmental imposition of a choice between receipt of benefits or adherence to religious practices violates the Constitution).

139 *Roy*, 476 U.S. at 703, 704.

140 *Id.* at 707, 708 (Burger, C.J., joined by Powell and Rehnquist, JJ.).

141 *Id.* at 727 (O'Connor, J., joined by Brennan and Marshall, JJ., dissenting).

142 *See Sherbert*, 374 U.S. at 404; *see also supra* notes 74-94 and accompanying text.

143 *Roy*, 476 U.S. at 727 (O'Connor, J., dissenting). The equal protection clause of the fourteenth amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

144 Once the Court had vacated the injunction preventing the government from

and its progeny should control the issue of whether Roy would need to provide his daughter's social security number in order to receive benefits.[145] Having determined that the requirement burdened Roy's free exercise rights, the Court, Justice O'Connor argued, should have applied the long line of precedents requiring the government to show an overriding interest in enforcing the regulation.[146] Indeed, the government argued that social security numbers were needed to prevent fraud but did not show how providing the religious exemption sought by Roy would demonstrably diminish the government's ability to combat welfare fraud.[147]

Roy signaled that at least three of the Justices were prepared to shift the free exercise analysis from the effect of the burden back to the form, thereby restricting the protection of religious conduct previously afforded by *Sherbert* and its progeny. Chief Justice Burger's plurality opinion ominously echoed the rational basis reasoning of *Braunfeld* and suggested that Court was retreating from the expansive scope of free exercise protection established by *Sherbert*.

II

THE *LYNG* CASE: A RECENT DEVELOPMENT IN FREE EXERCISE DOCTRINE

In April, 1988 the Court decided *Lyng v. Northwest Indian Cemetery Protective Association*,[148] reversing a court of appeals decision that had sustained a free exercise challenge based on the compelling state interest test.[149] In *Lyng*, American Indians challenged the United States Forest Service's plan to construct a six-mile paved road through the Chimney Rock section of the Six Rivers National Forest in northwestern California. The Yurok, Karok and Tolowathe tribes used this area for their sacred religious rituals.[150] The proposed plan also called for substantial timber harvesting in

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making routine use of Little Bird of the Snow's social security number, Justice Stevens saw nothing in the record that prevented Roy from receiving the disputed payments. *Roy*, 476 U.S. at 720 (Stevens, J., concurring in the result).

145 Justice Blackmun also considered the free exercise issue moot but addressed the issue hypothetically, concluding that *Sherbert* would control and prevent the government from denying Roy benefits for refusing, on religious grounds, to provide his daughter's social security number. *Id.* at 715-16 (Blackmun, J., concurring in part).

146 *Id.* at 727-28 (O'Connor, J., dissenting).

147 *Id.* at 728.

148 485 U.S. 439 (1988).

149 Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688 (9th Cir. 1986) (holding that the *Sherbert* line of cases controlled the Indians' free exercise claim and that the state had failed to show a compelling state interest in building the road sufficient to justify the burden on the Indians' free exercise), *rev'd*, 485 U.S. 439 (1988).

150 *Lyng*, 485 U.S. at 442. The Hoopa Valley Indian reservation adjoins the Six Rivers National Forest, and the Chimney Rock area has traditionally been a religious domain for the Yurok, Karok and Tolowa Indians. *Id.* at 442.

the Chimney Rock area.[151] Relying on the compelling interest standard developed in *Sherbert* and its progeny, the district court held that the proposed activities violated the free exercise clause by significantly burdening the American Indians' religious practices while serving a comparatively insubstantial state interest.[152] The district court also found that no other geographic areas held equivalent religious significance for the Indian tribes.[153] The Ninth Circuit Court of Appeals affirmed the lower court's constitutional ruling, concluding that the government had failed to demonstrate a compelling interest in completing the road.[154]

The Supreme Court granted certiorari to address the free exercise issue on its merits.[155] Writing for the Court, Justice O'Connor held that the free exercise clause does not require the government to present compelling justifications for incidental effects of its programs that render religious practice more difficult but have no tendency to force individuals to act in a manner contrary to their beliefs.[156]

In holding that the American Indians' free exercise claim did not require the government to present a compelling interest, *Lyng* significantly altered the free exercise precedent established by *Sherbert* and its progeny.[157] The Court's refusal to extend constitutional protection to the religious practices of the American Indians signaled a substantial retreat from the expansive protection afforded to earlier free exercise claims.

III
ANALYSIS

A. *Lyng* Misapplies *Roy* and *Yoder*

The *Lyng* Court's efforts to analogize its facts to those in *Bowen v. Roy*[158] and to distinguish *Wisconsin v. Yoder*[159] were unavailing.

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151 *Id.* at 443.

152 Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983), *aff'd in part*, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). Further statutory violations associated with the proposed activities led the district court to permanently enjoin road building and timber harvesting in the Chimney Rock area. *Id.* at 606-07.

153 *Id.* at 594.

154 Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). The court of appeals vacated those portions of the district court's injunction relating to timber harvesting that had been rendered moot by a congressional act declaring the Chimney Rock area wilderness off limits to commercial activities. *Id.* at 698.

155 Lyng v. Northwest Indian Protective Ass'n, 485 U.S. 439, 447 (1988).

156 *Id.* at 448.

157 *See* cases cited *supra* note 17.

158 476 U.S. 693 (1986); *see supra* notes 132-47 and accompanying text.

Justice O'Connor professed to find no meaningful distinction between the government's use of a social security number in *Roy* and the road building and timber harvesting on public lands in *Lyng*, insofar as both constituted internal government procedures.[160] The Court, however, glossed over the fact that federal land use decisions have substantial external effects and undergo public scrutiny.[161] Indeed, Congress had earlier recognized the potentially adverse impacts of land use decisions on American Indians when it enacted the American Indian Religious Freedom Act ("AIRFA").[162]

Furthermore, the distinction between administrative and prohibitive regulations that Chief Justice Burger examined in *Roy* had no application in *Lyng*.[163] Even though the use of a social security number may serve an administrative end, the use of the number in the government's computer systems could only conceptually interfere with free exercise rights. However, although the proposed road in *Lyng* may also serve an administrative end, the act of clearing the forest and the resulting destruction of the Indians' sacred religious areas would, as the Court admitted, "have severe adverse effects on the practice of their religion."[164] The Court's attempt to distingnish between prohibitive and administrative regulations amounted to no more than a distinction between direct and indirect burdens, a distinction the Court correctly rejected in *Sherbert v. Verner*.[165]

The Court's efforts to distinguish *Yoder* were equally unsatisfactory. The Court maintained that the coercive effect of the statute, rather than its impact on Amish religious values, controlled in *Yoder*.[166] *Yoder*, however, did not confine its analysis to the *coercive* impact of the compulsory school attendance. It focused on the "inescapable" objective danger the statute posed to free exercise rights. The Court determined that the threat compulsory education

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159 406 U.S. 205 (1972); *see supra* notes 109-20 and accompanying text.

160 " 'The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.' " *Lyng*, 485 U.S. at 448 (quoting *Roy*, 476 U.S. at 699).

161 *Id.* at 470-71 (Brennan, J., dissenting).

162 42 U.S.C. § 1996 (1982). AIRFA recognizes that many federal land use decisions cause infringements on Indian religious practices, but does not provide any statutory relief.

163 *See Roy*, 476 U.S. at 700 (free exercise rights do not afford an individual the right to dictate the internal affairs of government).

164 *Lyng*, 485 U.S. at 447.

165 *See* Marcus, *supra* note 24, at 1238-39 (arguing that *Sherbert* eliminated the distinction between direct and indirect burdens that *Braunfeld* had created).

166 *Lyng*, 485 U.S. at 456-57. The Court accused the dissent of misreading *Yoder*, claiming "there is nothing whatsoever in the Yoder opinion to support the proposition that the 'impact' on the Amish religion would have been constitutionally problematic if the statute at issue had not been coercive in nature." *Id. But see supra* notes 119-20 and accompanying text (interpreting *Yoder* to govern even facially neutral regulations).

posed to the existence of the Amish community and religion embodied the precise menace that the free exercise clause was intended to prevent.[167] Thus, the *Yoder* Court did rely on an analysis of the law's impact on Amish religious values and practices. Furthermore, the Amish could have sustained their beliefs by moving to a more tolerant area. The Indian faith, however, is inextricably bound to the land, which is site-specific and sacred.[168] The proposed road threatened to destroy the Indians' ability to practice their religion—yet the Court found nothing coercive or prohibitory about such an "incidental" effect.[169]

B. Determining the "Effect" on Religion: Form or Substance?

Under *Sherbert v. Verner* and its progeny the aim of free exercise protection is to safeguard religious expression from government interference by permitting an individual to conform her conduct to the dictates of her conscience.[170] The Constitution must protect religious practice and conduct to the extent necessary to allow free expression of religious belief.[171] A law that burdens conduct beyond this point offends the first amendment regardless of its form.[172] Nevertheless, the *Lyng* majority held that when the form of the burden was indirect, the offending regulation did not merit strict scrutiny regardless of its effect on religious practice.[173] As Justice O'Connor herself remarked in *Roy*, however, this direct/indirect distinction has no basis in precedent[174] and emasculates free exercise protection.[175] By ignoring the effect of the burden on religion,

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167 *Yoder*, 406 U.S. at 218 ("compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief . . . or be forced to migrate to some other and more tolerant region.").

168 *See* Suagee, *supra* note 114, at 10 (explaining that the site-specific nature of American Indian religious practice stems from the Indians' belief that land itself is a living, sacred being).

169 *Lyng*, 485 U.S. at 449. *But see id.* at 458, 468-69 (Brennan, J., dissenting) ("[W]e have recognized that laws that affect spiritual development by impeding the integration of children into the religious community or by increasing the expense of adherence to religious principles—in short, laws that frustrate or inhibit religious *practice*—trigger the protections of the constitutional guarantee.").

170 *See* Sherbert v. Verner, 374 U.S. 398, 402 (1963); *see also supra* note 13 and accompanying text.

171 *See* Marcus, *supra* note 24, at 1234 (arguing that religion, however narrowly defined, must encompass action as well as belief).

172 *See supra* note 93 and accompanying text.

173 *See Lyng*, 485 U.S. at 450; *see also* Roy v. Bowen, 476 U.S. 693, 704 (1986); Braunfeld v. Brown, 366 U.S. 599, 607, *reh'g denied*, 368 U.S. 869 (1961).

174 The distinction has no basis in precedent unless one considers that Justice Brennan declined in *Sherbert* to explicitly overrule *Braunfeld*, which did draw the distinction between direct and indirect burdens. *See supra* note 105 and accompanying text.

175 *Roy*, 476 U.S. at 727.

Lyng exhibited "distressing insensitivity"[176] to the constitutional guarantee of free exercise, reminiscent of the religious discrimination sanctioned by *Braunfeld v. Brown*.[177]

The constitutional "obligation of neutrality"[178] in religious matters does not restrict the Court from protecting the rights guaranteed by the religion clauses. Accordingly, if the guarantee of religious liberty embodied in the free exercise clause has any independent meaning, it must require the government to maintain a hospitable environment for individual belief and expression.[179] To avoid conflict with the establishment clause,[180] the government may not assist or endorse any or all religions.[181] Nevertheless, the Court's duty under the free exercise clause requires it to protect minority adherents from legislatively imposed religious discrimination. The government could not pass a law outlawing the religious beliefs of the Yurok, Karok and Tolowa Indians. When the government passes a neutral regulation that effectively destroys the Indians' ability to practice those beliefs, as the proposed road threatened to do in *Lyng*, the Court has an obligation to respect the Indians' free exercise rights by overturning the law.

The free exercise clause "is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."[182] The Indians in *Lyng* did not seek assistance or support from the government; they sought to prevent the government from building a road that would "virtually destroy . . . [their] ability to practice their religion."[183] Of course, the

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176 *Sherbert*, 374 U.S. at 413 (Stewart, J., concurring).

177 Consonant with Chief Justice Rehnquist's dissent in *Thomas*, the *Lyng* decision suggests that the Court is returning to the narrower *Braunfeld* construction of free exercise protection. See *supra* note 131 for a discussion of Justice Rehnquist's dissent in *Thomas*.

178 *Thomas*, 450 U.S. at 720 (Rehnquist, J., dissenting).

179 *See Sherbert*, 374 U.S. at 415-16 (Stewart, J., concurring). *Sherbert*'s inquiry emphasized governmental accommodation of individual belief rather than governmental enforcement of regulations at the expense of individual religious freedom.

180 "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. 1.

181 *See* Everson v. Board of Educ., 330 U.S. 1, 15 ("Neither a state nor the Federal government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another."), *reh'g denied*, 330 U.S. 855 (1947). In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Court wrote that a statute must pass a three-part test to withstand an establishment clause challenge: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.' " *Id.* at 612-13 (citations omitted). In Lynch v. Donnelly, 465 U.S. 668, *reh'g denied*, 466 U.S. 994 (1984), the Court stated that a challenged statute will fail the *Lemon* test if its purpose or effect conveys endorsement or disapproval of religion. *Id.* at 690 (O'Connor, J., concurring). *See also supra* note 131.

182 *Lyng*, 485 U.S. at 451 (citing *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring)).

183 *Id.* (quoting *Northwest Indian Cemetery Protective Ass'n*, 795 F.2d at 693).

extent of the injury should not determine the result. In *Sherbert*, for instance, the offensive regulation deprived Sherbert of at most "a few months of relatively low unemployment compensation benefits."[184] The harm, however, resulted from the state's interference with Sherbert's religious beliefs and her ability to practice them.[185] The fact that the proposed road in *Lyng* would virtually destroy the Indians' ability to practice their religion makes their claim more compelling, but the religious practice would deserve protection even if the harm were less.

When a legislature passes a law that directly or indirectly infringes on religious belief or conduct, the effect, not the form, of the law's burden on free exercise must control the constitutional analysis. As *Sherbert* recoguized, the correct disposition of free exercise challenges should depend on the law's effect on both the individual's beliefs and the individual's ability to conduct herself in a manner consistent with those beliefs.[186] By focusing on the indirect effect of the proposed road on the Indians, *Lyng* incorrectly allowed the form of the regulation to control the constitutional analysis. In so doing, the Court revitalized *Braunfeld*'s direct/indirect burden distinction that *Sherbert* had implicitly overruled.

C. Re-emergence of the Direct/Indirect Burden Distinction

Lyng's conclusion that the indirect effect of a neutral regulation is less intrusive than affirmative compulsion or direct prohibition is also flawed.[187] *Sherbert* abolished the distinction between direct and indirect effects on religious practices as one that lacked constitutional significance.[188] For instance, presumably even the *Lyng* Court would invalidate a coercive law that directly prohibited adherents from visiting a unique sacred area, unless the state could justify the law with an overriding secular interest.[189] Such a law would absolutely prohibit the adherents from practicing their religion. Under the *Lyng* analysis, a law that denied everyone access to a road that happened to be the only road leading to the sacred site would not violate the Constitution because it would have "no tendency to coerce individuals into acting contrary to their religious beliefs."[190] Yet such a law would create an effect identical to that of the direct prohibition. In both cases, the state would effectively prohibit the adherents from practicing their religion in accordance with their

184 Marcus, *supra* note 24, at 1239 n.119.
185 *See supra* notes 83-94 and accompanying text.
186 *See supra* notes 83-94 and accompanying text.
187 *See Lyng*, 485 U.S. at 450-51.
188 Marcus, *supra* note 24, at 1239.
189 *See Lyng*, 485 U.S. at 450-51.
190 *Id.*

faith. Permitting the form of a burden to control the constitutional analysis thus narrows the scope of free exercise protection because individuals will suffer from a law's effect, regardless of its form.

The distinction between direct and indirect effects on free exercise, although straightforward on the surface, has considerable constitutional significance. In the case of a direct burden such as a criminal prohibition, the adherent faces an immediate dilemma: remain faithful to religious belief or suffer the sanction imposed by law.[191] Criminal prohibitions represent the most intrusive burdens because direct burdens emphatically deny religious freedom and signal governmental rejection of the religion in question.

The difficulty with indirect burdens lies in their subtle application. Indirect burdens usually result from laws that apply to all citizens equally. The dilemma appears less extreme because of its incidental nature. For example, where a state mandates that stores must close on Sunday to provide a common day of rest for the good of society, the state's interest in protecting the health of its citizens represents a secular goal achieved through a neutral statute.[192] A Saturday Sabbatarian, however, may find himself disadvantaged by such a law. If he needed to stay open on Sunday to make up for the business lost on Saturday, the Sabbatarian might have to choose between foregoing his Sabbath or going out of business. The government's imposition of this choice interferes with the individual's religious practice and tends to compel conduct inconsistent with religious belief.[193] The *Lyng* Court relied on government compulsion as the touchstone of its analysis,[194] but ignored the fact that indirect burdens on religion can also have a coercive effect.

D. *Lyng* Revokes Protection of Indirect Burdens

Lyng acknowledged that the Court had in the past applied strict scrutiny to indirect burdens on the free exercise of religion.[195] In *Sherbert*, for instance, Justice Brennan compared a state's denial of unemployment benefits to a woman whose religion prohibited her from accepting employment requiring Saturday work to a fine imposed on worship.[196] Justice Brennan's analogy correctly characterized the burden as indirect. Although the law did not directly

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191 For example, an Amish father acting in accordance with his religious beliefs faced a fine and imprisonment for refusing to send his children to school. Wisconsin v. Yoder, 406 U.S. 205 (1972).

192 *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 607-08 (1961).

193 *See supra* note 85 and accompanying text.

194 *Lyng*, 485 U.S. at 450-51.

195 *Id.*

196 *See supra* notes 83-94 and accompanying text.

prevent Sherbert from observing her Saturday Sabbath, it required her to forego her religious beliefs in order to receive state benefits.

In *Lyng*, however, Justice O'Connor mischaracterized the Court's prior treatment of and distinction between direct and indirect burdens. A fine imposed on worship constitutes a direct burden; the law in *Sherbert*, as Justice Brennan admitted, created only an indirect effect.[197] Yet Justice O'Connor recharacterized the indirect burden in *Sherbert* as a direct burden. Justice O'Connor needed to do so in order to avoid explicitly overruling *Sherbert*, since that case had affirmatively applied strict scrutiny to laws that only indirectly burdened religious practices.[198] Under the *Lyng* analysis, indirect burdens do not violate the free exercise clause.

E. Potential Effects of *Lyng* on Free Exercise Precedent

The future impact of *Lyng* will depend on how courts distinguish between governmental regulations that compel affirmative conduct incompatible with religious beliefs and regulations that make religious practices more difficult or illegal.[199] In many cases, as in *Lyng*, the effect of the offensive regulation on religious practice will be the same, whether the burden is characterized as direct or as indirect. For instance, would a law denying unemployment benefits to an individual because her religion forbids her to work on Saturday compel her to work on Saturday against her beliefs, or simply make it more difficult for her to rest on her Sabbath as her faith dictates? Would a law compelling Amish children to attend public school coerce them into acting inconsistently with their faith, or merely make it more difficult for them to act in accordance with it? In both cases the distinction between direct and indirect burdens becomes muddled[200] and lacks constitutional significance. Unfortunately, *Lyng* makes this ambiguous distinction the touchstone of free exercise protection. The Court should abandon this distinction in free exercise challenges and apply strict scrutiny to laws that both directly and indirectly restrict the free exercise of religion.

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197 *See* Marcus, *supra* note 24, at 1239.

198 *See supra* note 90 and accompanying text.

199 *See Lyng*, 485 U.S. at 468 (Brennan, J., dissenting).

200 The regulation in *Lyng* did not affirmatively compel the Yurok, Karok and Tolowa Indians to act against their beliefs; rather, as *Lyng* held, the proposed road construction would simply make it more difficult (if not impossible) for them to practice their religion. *Id.* at 451. But the effect on their free exercise rights is no less drastic. Indeed, *Lyng* presents a more compelling case than any of the cases in the *Sherbert* line, because the proposed road construction would not simply hinder the Indians' ability to practice their religion but would virtually destroy their religion altogether. *See id.* at 466-69 (Brennan, J., dissenting).

CONCLUSION

After *Lyng*, *Sherbert*'s viability is uncertain. *Lyng* signals an inappropriate revival of the distinction between direct and indirect burdens that *Braunfeld* adopted and *Sherbert* rejected, and means that free exercise protection will be subject to the lowest level of scrutiny. The scope of the constitutional guarantee of free exercise of religion now depends on the Court's tenuous distinction between regulations that coercively impact religious practices and regnlations that only make it more difficult for an individual to practice his beliefs.

Lyng's refusal to extend protection to indirect as well as direct burdens on free exercise rights rests on a misplaced concentration on the form, rather than on the effect of the regulation's burden. The Court has mistakenly forsaken the protection of religious practices and conduct as the best means of securing the right to free exercise of religion, and has therefore eroded that right. The Court should return to the standard developed in *Sherbert* and its progeny and apply strict scrutiny to laws that either directly or indirectly burden the free exercise of religion.

J. Brett Pritchard